(2)

No. 05-988

In The

Supreme Court of the United States

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,

Petitioner,

v.

EARL F. ARAKAKI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

MARK J. BENNETT
Attorney General of Hawaii
GIRARD D. LAU*
CHARLEEN M. AINA
Deputy Attorneys General
**Counsel of Record*
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

Plaintiffs-Respondents' opposition simply confirms the appropriateness of granting Petitioner Governor Lingle's certiorari petition.

First, the opposition brief explicitly concedes that Governor Lingle's certiorari petition should be granted. *See* Brief in Opposition at 1 ("Respondents . . . do not oppose, indeed they welcome, this Court's review of *all* the 'standing' issues in this case"); *id.* at 3 ("respondents welcome this Court's review"); *id.* at 8 ("Respondents pray that this Court . . . grant a writ of certiorari to . . . the petitioner"); *id.* at 10 ("The Court should grant . . . the petition[s] . . . for writs of certiorari.").

Second, Plaintiffs-Respondents do not even attempt to contest the grounds for certiorari demonstrated by the Governor in her petition. For example, they do *not* dispute the importance of the issue of federal courts allowing standing to plaintiffs who have alleged no direct injury, and who rely solely upon their status as state taxpayers to get into federal court. They do *not* deny that such suits result in federal courts resolving abstract questions for parties with no real injury, needlessly interfere with state governmental operations, undermine federalism and separation of powers, and waste scarce judicial resources. Nor does the opposition refute that the issue should be decided by this Supreme Court. Indeed, as noted in the prior paragraph, they *ask* this Court to decide the issue.

Furthermore, and significantly, the opposition does not and cannot dispute the direct conflict between the Ninth Circuit's decision below and the decisions of five other circuits clearly rejecting general state taxpayer standing.

Third, Plaintiffs-Respondents put forth no serious argument to refute Governor Lingle's claim that the Ninth Circuit's ruling granting state taxpayer standing was erroneous. Their only attempt at opposition is the following:

> The petition casts the "question presented" as whether state taxpayers have standing "simply because they pay taxes to the state."
>
> Respondents never made such a claim. Rather, their complaint, as taxpayers, is that the state does not treat all taxpayers equally: It singles out respondents and other taxpayers similarly situated and denies them the benefit of the part of their taxes used exclusively for those of the favored racial ancestry.

Brief in Opposition at 1-2. Of course, this assertion is patently frivolous. Both the District Court and the Ninth Circuit upheld plaintiffs' standing simply because plaintiffs were state taxpayers, provided, of course, that the challenged programs used state taxpayer monies, and those taxpayer monies would not be used if the programs were successfully enjoined. *See* District Court Orders in Appendix to Petition ("App.") 153-55; App. 118-120, 122 (*see also* App. 84-85); *Arakaki v. Lingle*, 423 F.3d 954, 967-69 (9th Cir. 2005) (App. 21-24).

Realizing the vulnerability of the Ninth Circuit's state taxpayer standing doctrine – which conflicts with every other Circuit that has reached the issue squarely, and with this Court's *ASARCO* opinion by Justice Kennedy (joined by Justices Stevens and Scalia, and the late Chief Justice Rehnquist), and Justice Breyer's *Nike* opinion (joined by former Justice O'Connor) – the opposition cavalierly attempts to change the question into a *non*-"state taxpayer

standing" issue. The opposition now asserts that their real injury is *not* that their tax dollars are being spent on an allegedly unconstitutional program, which, if enjoined, would save them tax dollars, but rather that they are "not treat[ed] . . . equally" as taxpayers. Brief in Opposition at 2. But any differential treatment would stem only from the fact that some of the challenged state taxpayer funded OHA programs limit participation to Native Hawaiians. Yet, as noted in Governor Lingle's petition, and which the opposition does not seriously dispute:

> *Plaintiffs, however, did not allege that any of them applied for, otherwise sought, or were even interested in, participation in those programs.*

Petition at 5. Because Plaintiffs-Respondents never asserted any interest in participating in OHA programs limited to Native Hawaiians, plaintiffs plainly were *not* denied equal treatment (whether as individuals, as taxpayers, or in any other capacity). *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (Allegations of governmental racial discrimination are insufficient to confer standing where "the plaintiffs were not personally subject to the challenged discrimination.").

Plaintiffs have simply failed to allege or demonstrate that *they personally* were victimized by any Native Hawaiian qualifications imposed by OHA – which is not surprising because they have all along rested their claim to federal court jurisdiction on their state *taxpayer* status. Accordingly, if their state taxpayer status is insufficient to generate standing, plaintiffs are left complaining of nothing more than the psychological stress of believing that their government is not acting constitutionally. That type of distress, of course, is plainly insufficient to establish Article III standing. *See Lujan v. Defenders of Wildlife*,

504 U.S. 555, 573-74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.").[1]

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[1] In a desperate attempt to now generate a *non*-"state taxpayer" basis for standing, Plaintiffs-Respondents point to a lone belated declaration of a single plaintiff, Donna Malia Scaff, who fails to identify even one OHA program in which she would like to participate. Her declaration simply makes the wholly conclusory assertion that she is "'able and ready' to apply for benefits" from a pool of OHA funds that are used for various different programs, without identifying in even the most general way which particular program(s) she is interested in. This is not surprising as Scaff, as far as the record discloses, likely has no personal desire to participate in any OHA program, and is simply a person who, like the other plaintiffs, has an ideological objection to OHA's limiting some of its programs to Native Hawaiians. Her declaration makes the generalized nature of her grievance very clear:

> 5. Appropriations to or for OHA for "native Hawaiians", and OHA's retention and use of public funds only for "native Hawaiians", also injure me as a citizen. The OHA laws deny me the opportunity to apply and compete for benefits from the funds held by OHA for native Hawaiians on an equal basis. The imposition of this racial barrier denies to me the equal protection of the laws and causes me an injury in fact. I am "able and ready" to apply for benefits from those funds should the State or OHA cease to use race, i.e., excluding anyone who is not "native Hawaiian", with respect to the use of those funds.

Declaration of Scaff (Brief in Opposition at App. 2-3). While Scaff attempts to fabricate a personal stake by simply *asserting* in the last sentence that she is "ready" to apply for OHA benefits, her failure to identify any particular OHA program or benefit she seeks reveals the illusory nature of her interest. OHA, of course, has many different programs (3/7/02 Affidavit of Clyde W. Namu'o at ¶6), yet Scaff does not assert an interest in any *particular* program or programs. Moreover, this Court requires that one not merely *assert* that one is "able and

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ready" to apply, but actually "*demonstrate*" that one is able and ready. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Northeastern Florida Chapter v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Adarand Constructors v. Pena*, 515 U.S. 200, 211-12 (1995) (requiring plaintiff to make "an *adequate showing* that sometime in the relatively near future it will bid on another Government contract").

That a plaintiff's general and vague assertion that she is "ready to apply" for benefits – without identifying what particular benefits (among many possible options) she seeks – is insufficient to confer Article III standing is confirmed by this Court's ruling in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (emphasis added), which held that:

> In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the nonmoving party" only in the sense that, where the facts *specifically* averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that *general* averments embrace the "*specific* facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth *specific* facts showing that there is a genuine issue for trial." *The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.* Rather, . . . as to a *specific* fact essential to the other side's case[, a party may] demand at least one sworn averment of that fact before . . . lengthy . . . litigation continues.
>
> . . . It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade . . . .

Scaff's declaration is precisely the sort of *general* allegation this Court in *National Wildlife Federation* deemed insufficient to satisfy Rule 56's demand for *specific* facts. By merely averring in vague and conclusory terms a readiness to apply for some *unspecified* OHA benefits at some *unspecified* time, Scaff's declaration falls way short of meeting this standard. As this Court stated in the *other Lujan* case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (first emphasis added), "[s]uch 'some day' intentions – without any *description of concrete plans*, or indeed even any specification of *when* the some day

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will be – do not support a finding of the 'actual or imminent' injury that our cases require."

Plaintiffs try to avoid the "specific facts" standard by citing the portion of *Defenders of Wildlife*, 504 U.S. at 561, which states that "[a]t the *pleading* stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Plaintiffs' argument is misplaced because we are dealing here with the equivalent of a Rule 56 motion (governed by the "specific facts" standard), not a pleadings-only-based ordinary motion to dismiss (governed by the "general allegations" standard). This is so for two reasons.

First, plaintiffs, by urging this Court to consider the Scaff declaration, are necessarily converting the matter into a summary judgment determination under Rule 56. *See* Fed. R. Civ. Proc. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ."). Thus, the "general allegations" standard is inapplicable; the Rule 56 standard requiring *specific* facts is the operative one.

Second, because the matter at issue is the *subject matter jurisdiction* of the federal courts to even hear the case, motions to dismiss for lack of subject matter jurisdiction automatically require the plaintiffs to present *evidence* to support their allegations of injury; plaintiffs cannot simply stand upon the raw allegations of their complaint. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (1989) ("challenges to a court's subject matter jurisdiction . . . are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under rule 12(b)(6). Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. *It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.*"). Accordingly, because plaintiffs must present *evidence* to defeat a motion to dismiss based upon lack of injury and thus standing, we are necessarily brought under the "specific facts" standard, which requires *specific* averments.

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As already explained above, Scaff's declaration merely asserting a readiness to apply for *unspecified* OHA benefits at an *unspecified* time seriously fails this "specific facts" standard.

Moreover, even if this Court, contrary to the above, were to treat this matter as being resolved on the *pleadings alone* and *not* as a Rule 56 matter, such that the "general allegations" standard applied – where general allegations are presumed to embrace the necessary specific facts to support the claim – plaintiffs' ***complaint*** does *not* even make any *general* allegations that any of the plaintiffs, including Scaff, desire to participate in OHA's programs. *See* Complaint, paragraph 9 [Cross-Pet. App. 82] (alleging only that each plaintiff "has a material financial interest in the subject matter of this action as a *taxpaying citizen* of the State of Hawaii and the United States"). Paragraphs 62.b and 58.d [Cross-Pet. App. 104, 101-02], cited by plaintiffs in their Brief in Opposition at 3, fail to allege any desire to participate in OHA programs. (¶ 58.d is also irrelevant, as it deals with plaintiffs' *HHCA / DHHL* claims, which were dismissed.).

Furthermore, Scaff's vague and conclusory assertion of interest is even more inadequate because she fails to aver that she participated *in the past* in a particular OHA program. *Cf., e.g., Adarand*, 515 U.S. at 211-12 (granting subcontractor standing because its general manager stated in deposition that the company "bids on every guardrail project in [the state]"). Although a demonstrated history (or even a single prior example) of participation in the subject program may not be a prerequisite to standing in every case, where Scaff makes only the most general and vague assertion of an interest in OHA programs, and cannot even identify the particular OHA program she desires to participate in, the absence of any prior participation underscores and heightens the speculative nature of her conclusory averment.

Finally, even if Scaff had asserted an interest in a *particular* OHA program, because she did not demonstrate that she met the bare minimum requirements for participation in that program (excluding, of course, any Native Hawaiian qualification), she does not have standing. For if she does not meet the minimum requirements, the challenged Native Hawaiian qualification is irrelevant, and a ruling striking that qualification would provide her with no redress. *Cf. Carroll v. Nakatani*, 342 F.3d 934, 942-43 (9th Cir. 2003) (Plaintiff lacked standing to challenge loan's Native Hawaiian qualification because his failure to meet the other minimum requirements for obtaining the loan meant that "[e]ven assuming [plaintiff] had a legitimate intention to apply for a loan, he [failed] to demonstrate that he is in a position to compete" for

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Plaintiffs-Respondents improperly discuss the underlying Equal Protection claim in this case, even though the only issue raised by the Governor's certiorari petition is one of taxpayer *standing*. That discussion, therefore, besides being misleading, is entirely irrelevant.

Finally, Plaintiffs-Respondents improperly discuss *their cross*-petition, which raises *different* standing issues (e.g., trust beneficiary standing), and is not relevant to whether this Court should grant certiorari on *this* petition (filed by *defendant* Governor Lingle) raising the single straightforward question of general state taxpayer standing. In any event, that cross-petition clearly does *not* warrant review by this Court. It does not even address the

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the loan.). Although a plaintiff need not establish that she would actually receive or be awarded the benefit absent the challenged qualification, *see Northeastern Florida Chapter v. City of Jacksonville*, 508 U.S. 656, 666 (1993), a plaintiff must at least satisfy the other minimum eligibility criteria; otherwise, a ruling on the merits in plaintiff's favor would not redress the injury of not being able "to compete on an equal footing." *Id.* A plaintiff ineligible for other reasons simply cannot "compete" at all *regardless* of the challenged qualification. Indeed, if Article III is to mean anything, being "able and ready" to apply means more than just being ready to submit a physical application form, but necessarily encompasses being *qualified* to compete for the benefit. *See Carroll*, 342 F.3d at 943 ("submission of a meritless application falls short of being 'able and ready' to compete"). For example, a white person *with no education whatsoever* surely does not have standing to challenge a medical school minority quota admissions policy even if that person averred that he or she would submit an application. Likewise, a naked conclusory averment that Scaff is ready and able to apply for a particular OHA benefit were the Native Hawaiian qualification stricken does not generate Article III injury where she does not establish that she meets all other minimum requirements for that particular benefit. (Of course, the precise minimum requirements would depend upon which OHA benefit Scaff sought, and Scaff's failure to identify the *particular* OHA benefit she desires makes identifying those requirements impossible).

Rule 10 criteria for certiorari, as it fails to assert (other than in the most conclusory fashion), much less establish, the *importance* of the particular *standing* issues they raise. Cross-Petitioners' suggestion that the Ninth Circuit's adverse standing rulings preclude all possible judicial review of their underlying Equal Protection challenges is frivolous. Any person actually subjected to, and injured by, the Native Hawaiian qualifications – as opposed to Cross-Petitioners, who are mere undifferentiated state taxpayers or inhabitants of Hawaii – could bring those Equal Protection challenges without any standing problems whatsoever.[3]

CONCLUSION

Because the Ninth Circuit's acceptance of general state taxpayer standing raises fundamentally important questions of Article III and prudential standing, and undermines our federal system, needlessly disrupts state governmental programs, wastes scarce judicial resources, and creates a substantial inter-circuit conflict, Governor Lingle respectfully asks that this Court grant her petition

[3] The cross-petition also fails to assert, let alone establish, any conflict between the Ninth Circuit's rulings on those standing issues and a decision of this Court, other federal circuits, or state courts of last resort. In addition, the cross-petition is, for the most part, virtually impossible to comprehend. *See* Supreme Court Rule 14.4 ("The failure of a petitioner to present with . . . *clarity* whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

for certiorari.[3] Even Plaintiffs-Respondents concede Governor Lingle's petition should be granted.

Dated: April 3, 2006.

Respectfully submitted,

MARK J. BENNETT
Attorney General of Hawaii
GIRARD D. LAU*
CHARLEEN M. AINA
Deputy Attorneys General
*Counsel of Record
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Petitioner

[3] The plaintiffs' cross-petition, however, should be denied.